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The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits

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NOTES

The Self-critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits

Executive Order 11,246[1] requires that nonexempt government contractors[2] agree to nondiscrimination and affirmative action program provisions in contracts with governmental agencies.[3] A large proportion of American employers must prepare affirmative action plans under this order.[4] These plans must include statistical analyses of the sexual, racial and ethnic composition of the employer's work force and of the availability of women and minorities to fill particular jobs,[5] an

1. 3 C.F.R. 339 (1964-65 Comp.), *reprinted as amended in* 42 U.S.C.A. § 2000e app. at 19-24 (1981). A history of nondiscrimination clauses in preceding executive orders is detailed in Contractors Assn. v. Secretary of Labor, 442 F.2d 159, 168-71 (3d Cir.), *cert. denied,* 404 U.S. 854 (1971).

2. The Department of Labor has exempted contracts and subcontracts not exceeding $10,000, except government bills of lading and contracts with financial institutions which are depositories for federal funds or issue savings bonds or notes. If a contractor has contracts or subcontracts within a 12-month period with an aggregate value exceeding $10,000, the exemption does not apply. 41 C.F.R. § 60-1.5(a)(1) (1984).

3. Contractors and subcontractors must agree not to "discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin" and to "take affirmative action" to ensure that applicants and employees are treated "without regard" to such factors. Exec. Order No. 11246, § 202(1), 3 C.F.R. 339 (1964-65 Comp.), *reprinted as amended in* 42 U.S.C.A. § 2000e app. at 19-24 (1981). Exec. Order No. 11375, 3 C.F.R. 684 (1967), added the word "sex" and substituted "religion" for "creed."

4. All nonconstruction contractors with 50 or more employees and a government contract of $50,000 or more must institute a formal, written affirmative action plan for each of its establishments. 41 C.F.R. §§ 60-1.40(a), -2.1(a) (1984). According to an early estimate, one-third of the labor force was covered by the Executive Order in 1966. Note, *Executive Order 11246: Antidiscrimination Obligations in Government Contracts,* 44 N.Y.U. L. REV. 590, 591-92 (1969). A later estimate placed the coverage at 40% of the workforce. V. PERLO, ECONOMICS OF RACISM USA 225 (1976), *quoted in* U.S. COMMN. ON CIV. RTS., PROMISES AND PERCEPTIONS: FEDERAL EFFORTS TO ELIMINATE EMPLOYMENT DISCRIMINATION THROUGH AFFIRMATIVE ACTION 5 (1981). In 1972 more than 50% of firms employing more than 100 people were covered under the Executive Order. Goldstein & Smith, *The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors,* 29 INDUS. LAB. REL. REV. 523, 524 (1976).

5. The plan must contain a statistical analysis of the employer's work force, 41 C.F.R. § 60-2.11(a) (1984), and of the availability of minorities and women available for employment in job groups (consisting of jobs with similar content) wage rates and opportunity for advancement, 41 C.F.R. § 60-2.11(b) (1984). Extensive information must be gathered and considered in determining availability. Section 60-2.11(b)(1) provides:

> In determining whether minorities are being underutilized in any job group, the contractor will consider at least all of the following factors:
>
> (i) The minority population of the labor area surrounding the facility;.
>
> (ii) The size of the minority unemployment force in the labor area surrounding the facility;
>
> (iii) The percentage of the minority work force as compared with the total work force in the immediate area;
>
> (iv) The general availability of minorities having requisite skills in the immediate labor area;

analysis of the employer's utilization of the available workers,[6] goals to correct deficiencies,[7] and a self-critical discussion of the employer's problem areas.[8]

Plaintiffs bringing federal employment discrimination suits under Title VII of the Civil Rights Act of 1964[9] are often interested in either the statistics or the self-analysis of company policy contained in affirmative action plans and frequently attempt to obtain them from a defendant employer during discovery.[10] These discovery requests create a conflict between the plaintiff's interest in obtaining the informa-

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(v) The availability of minorities having requisite skills in an area in which the contractor can reasonably recruit;

(vi) The availability of promotable and transferable minorities within the contractor's organization;

(vii) The existence of training institutions capable of training persons in the requisite skills; and

(viii) The degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

The factors for determining availability of women are similar. 41 C.F.R. § 60-2.11(b)(2) (1984).

6. Work force levels and availability must be compared to determine where minorities and women are "underutilized." " 'Underutilization' is defined as having fewer minorities or women in a particular job group than would reasonably be expected by their availability." 41 C.F.R. § 60-2.11(b) (1984). At present, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) defines a deficiency as any difference between availability and utilization. OFCCP Federal Contract Compliance Manual §§ 2-160.1a, 2-180.2 (1979).

In regulations proposed August 25, 1981, the OFCCP proposed to redefine underutilization so that an establishment would be presumed to have reasonably utilized women and minorities if utilization were at 80% of availability. 46 Fed. Reg. 42,994 (1981) (to be codified at 41 C.F.R. § 60-2.11(b). As of July 1, 1984, no action had been taken on the proposed changes. 41 C.F.R. Appendix — Postponed Regulations: Chapter 60-Office of Fed. Contract Compliance Programs (1984).

7. "An acceptable affirmative action program must include . . . goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to achieve prompt and full utilization of minorities and women at all levels and in all segments of its work force where deficiencies exist." 41 C.F.R. § 60-2.10 (1984). These goals should not be "inflexible quotas" but "targets reasonably attainable by means of applying every good faith effort." 41 C.F.R. § 60-2.12(e) (1984).

8. 41 C.F.R. §§ 60-2.10, -2.13(d) (1984).

9. 42 U.S.C. § 2000e (1982).

10. Plaintiffs may alternatively obtain the plans through the Freedom of Information Act (FOIA), 5 U.S.C. §§ 552 (1982), from OFCCP, which administers the Executive Order. This process is often difficult and time consuming. *See* Fleming, *The Freedom of Information Act: An Important Discovery Aid in Labor Law Cases,* 16 LAW NOTES FOR THE GEN. PRACTITIONER 53, 54 (1980); Note, *A Balanced Approach to Affirmative Action Discovery in Title VII Suits,* 32 HASTINGS L.J. 1013, 1021 (1981).

Employers may respond to a FOIA request for an affirmative action plan with a "reverse FOIA" suit to block release, claiming that the agency abused its discretion by failing to categorize the plan under one of FOIA's nine exemptions. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979); 5 U.S.C. § 552 (1976); *see also* CNA Fin. Corp. v. Donovan, 28 Empl. Prac. Dec. (CCH) ¶ 32,402 (D.D.C. 1981) (allowing the release of affirmative action plans using *Chrysler* criteria).

The FOIA is also less attractive to Title VII plaintiffs because there is no requirement that the plans be filed with OFCCP, although the contractor must produce them on request from OFCCP, such as during a compliance review. 41 C.F.R. § 60-1.7(a)(3), -1.40(c), -2.12(m), (n) (1984). Data files maintained by a government grantee are not "agency records" and therefore not within the scope of FOIA, even though the government has a right of access to the data. Forsham v. Harris, 445 U.S. 169 (1980). Therefore, plans that have never been submitted to

tion and the employer's interest in maintaining the confidentiality of the plans. Courts have differed widely in their approach to this conflict and have split on the question of whether plans should be discoverable.[11]

This Note argues that plaintiffs should have access to affirmative action plans in discovery. Part I describes the "self-critical analysis" or "self-evaluative" privilege that employers have advanced to block discovery of such plans. Part II examines the conflicting interests of society, employers and employees in allowing or denying discovery. Part III evaluates the application of a self-critical analysis privilege in light of these conflicting interests and concludes that the privilege should not be applied to affirmative action plans.

I. THE SELF-CRITICAL ANALYSIS PRIVILEGE

Affirmative action plans play an important role in both of the major federal programs aimed at eliminating employment discrimination. The plans are a cornerstone of the Executive Order program, which uses the government's contracting power to set standards for employers.[12] In addition, the plans aid the enforcement of Title VII's statutory prohibition against employment discrimination based on "race, color, religion, sex, or national origin."[13] Private suits by employees are one of the many administrative and judicial enforcement mechanisms that Title VII provides,[14] and employers have frequently faced extensive discovery requests for affirmative action materials in such suits. Although employers have occasionally invoked the work product doctrine,[15] employee privacy,[16] trade secrets,[17] the attorney-client

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OFCCP probably cannot be disclosed under FOIA. *See* B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 930-31 n.221 (2d ed. 1983).

A second alternative to discovery is obtaining the plans from the Equal Employment Opportunity Commission (EEOC). Title VII plaintiffs who file grievances with the EEOC may obtain the information contained in EEOC investigatory files. EEOC v. Associated Dry Goods Corp., 449 U.S. 590 (1981). However, the investigatory files rarely contain affirmative action plans, although disclosure of the plans between agencies has been upheld. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); Reynolds Metal Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), *cert. denied,* 433 U.S. 995 (1978).

11. *See* notes 32-34 *infra* and accompanying text.

12. *See* notes 1-8 *supra* and accompanying text.

13. 42 U.S.C. § 2000e-2(a) (1976).

14. A person claiming to be a victim of discrimination must file a charge with the EEOC. The EEOC investigates the charge, and will dismiss it if it finds no reasonable cause to believe the charge is true. If reasonable cause is found, the EEOC must try to eliminate the discriminatory practice by "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b) (1976). If these informal methods fail, the EEOC may bring a civil action against the employer. 42 U.S.C. § 2000e-5(f)(1). An employee may request a right-to-sue letter, 29 C.F.R. § 1601.28(a)(1) (1984), and then file a private action if the EEOC either dismisses the charge or does not file suit within 180 days after the charge was filed with it. 42 U.S.C. § 2000e-5(f)(1).

15. The work product doctrine protects information "prepared in anticipation of litigation or for trial." FED. R. CIV. P. 26(b)(3). The term was initially articulated in Hickman v. Taylor, 153 F.2d 212, 223 (3d Cir. 1945), *aff'd.*, 329 U.S. 495 (1947). Affirmative action plans or related

privilege[18] and the physician-patient privilege[19] to limit discovery in employment discrimination cases, none of these concepts are generally appropriate for protection of affirmative action plans, and employers have increasingly relied on a self-critical analysis privilege to resist discovery of these plans.[20]

The self-critical analysis privilege was originally invoked to protect a hospital committee's investigatory report in *Bredice v. Doctors Hospital,*[21] a medical malpractice case.[22] The court denied discovery on the

material have occasionally been protected as work product. *E.g.,* Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907 (N.D. Cal. 1980) (formal responses to EEOC charges protected); Rodgers v. United States Steel Corp., 12 Fair Emp. Prac. Cas. (BNA) 100 (W.D. Pa. 1975) (plan protected; "To hold that validation studies prepared after the passage of Title VII were not prepared in anticipation of litigation . . . would be to strain the limits of credulity."); Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117, 118 (N.D. Ga. 1971) (internal report used to prepare affirmative action plan could be work product where preparation team included an attorney and report contained his " 'mental impressions, conclusions, opinions, or legal theories' "). Affirmative action plans required under the Executive Order would not normally pass the test for work product since they are prepared in the normal course of business and not in anticipation of litigation. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970).

16. *See, e.g.,* Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (upholding employer's refusal to turn over aptitude test scores to union on grounds of employee privacy); Baer v. Standard Oil Co., 13 Fair Empl. Prac. Cas. (BNA) 657 (N.D. Cal. 1976) (defendant not required to provide information on religious affiliation of employees); *cf.* CNA Fin. Corp. v. Donovan, 28 Empl. Prac. Dec. (CCH) ¶ 32,402, at 23,735 (D.D.C. 1981) (FOIA disclosure of affirmative action plan; salary information withheld for employee privacy). *But see* Sears Roebuck & Co. v. General Servs. Admin., 402 F. Supp. 378, 384-85 (D.D.C. 1975) (FOIA disclosure of plan upheld; rejected privacy reasons for withholding comments), *remanded,* 553 F.2d 1378 (D.C. Cir.), *cert. denied,* 434 U.S. 826 (1977).

17. *See, e.g.,* National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272, 279 (D. Conn. 1980) (defendant may eliminate critical self-evaluations from affirmative action plan before discovery, not to advance policy of encouraging effective self-criticism, but to avoid adverse business impact); *cf.* Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980) (disclosure of affirmative action plan under FOIA would expose confidential business information, violating 18 U.S.C. § 1905 and resulting in economic damage), *vacated and remanded sub nom.* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981).

18. *See, e.g.,* Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907, at 15,696 (N.D. Cal. 1980)

19. *See, e.g.,* Davis v. Street Pavers, Local 440, 9 Empl. Prac. Dec. (CCH) ¶ 10,116 (W. D. Wash. 1975).

20. The broad discovery of materials "not privileged" under Federal Rule of Civil Procedure 26(b)(1), *see* note 87 *infra,* refers both to privilege as it is understood in the rules of evidence and to the work product doctrine. United States v. Reynolds, 345 U.S. 1, 6 (1953); *see also* C. WRIGHT, FEDERAL COURTS § 81 (4th ed. 1983). However, the self-critical analysis privilege has been asserted only during discovery and could be regarded as a discovery privilege analogous to the work product doctrine rather than as an evidentiary privilege. *See* Flanagan, *Rejecting a General Privilege for Self-Critical Analyses,* 51 GEO. WASH. L. REV. 551, 575, 577 (1983).

21. 50 F.R.D. 249 (D.D.C. 1970), *affd.,* 479 F.2d 920 (D.C. Cir. 1973).

22. Hospital medical review proceedings are protected by statute in several states, *see, e.g.,* Scott v. McDonald, 70 F.R.D. 568 (N.D. Ga. 1976), but courts have disagreed on whether to apply a common law privilege. *Compare* Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971); Dade County Medical Assn. v. Holis, 372 So. 2d 117 (Fla. Dist. Ct. App. 1979); Oviatt v. Archbishop Bergan Mercy Hosp., 191 Neb. 224, 226-27, 214 N.W.2d 490, 492 (1974) (recognizing a privilege), *with* Davidson v. Light, 79 F.R.D. 137, 139-40 (D. Colo. 1978); Shibilski v. St. Joseph's Hosp., 83 Wis. 2d 459, 467, 266 N.W.2d 264, 268 (1978) (refusing to recognize a privi-

ground that release of such reports would end candor and criticism in staff deliberations, which the court found necessary to continued improvements in patient care.[23] This general public policy favoring confidentiality for self-criticism has been expanded and applied, although by no means uniformly, to protect documents in other contexts, including police department investigations[24] and academic peer reviews.[25] Corporations have asserted, so far unsuccessfully, a similar privilege to protect internal reports of corporate investigations.[26]

The first court to recognize a self-critical analysis privilege in a Title VII case applied it to internal reports used in preparation of an affirmative action plan rather than to the plan itself.[27] The court relied on an analogy to *Bredice* and concluded that discovery of the reports would "discourage frank self-criticism and evaluation in the development of affirmative action programs."[28]

The courts have since extended this privilege from background reports to the finalized plans required by Executive Order 11,246, reasoning that the privilege

stems from the public policy which recognizes that voluntary compli-

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lege). *See generally* Hall, *Hospital Committee Proceedings and Reports: Their Legal Status,* 1 AM. J. L. & MED. 245 (1975).

23. *Bredice,* 50 F.R.D. at 250-51.

24. *See, e.g.,* Brown v. Thompson, 430 F.2d 1214 (5th Cir. 1970); Kott v. Perini, 283 F. Supp. 1 (N.D. Ohio 1968). Police reports may also be protected from discovery under the executive privilege. *See, e.g.,* Frankenhauser v. Rizzo, 59 F.R.D. 339, 342-44 (E.D. Pa. 1973); Wood v. Breier, 54 F.R.D. 7, 11 (E.D. Wis. 1972).

25. *See, e.g.,* McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975) (denying discovery of confidential peer reviews); EEOC v. University of Notre Dame, 715 F.2d 331 (7th Cir. 1983) (files discoverable by EEOC but reviewers' identities concealed). *But see* Gray v. Board of Higher Educ., 692 F.2d 901, 908 (2d Cir. 1982) (requiring disclosure); *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. 1981) (same), *cert. denied,* 457 U.S. 1106 (1982); Lynn v. Regents of the Univ. of Cal., 656 F.2d 1337, 1347 (9th Cir. 1981) (requiring disclosure when the university's defense is based on the contents of the files), *cert. denied,* 459 U.S. 823 (1982); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379, 1384-85 (5th Cir. 1980) (same); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 581 (4th Cir.) (same, in dictum), *cert. denied,* 434 U.S. 904 (1977); Zaustinsky v. University of Cal., 96 F.R.D. 622, 625 (N.D. Cal. 1983) (requiring disclosure if plaintiff can demonstrate a prima facie case). *See generally* Lee, *Balancing Confidentiality and Disclosure in Faculty Peer Review: Impact of Title VII Litigation,* 9 J. COLL. & U.L. 279 (1983); Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege,* 69 CALIF. L. REV. 1538 (1981).

26. *See, e.g.,* FTC v. TRW, Inc., 628 F.2d 207, 210-11 (D.C. Cir. 1980); United States v. Noall, 587 F.2d 123, 126-27 (2d Cir. 1978), *cert. denied,* 441 U.S. 923 (1979); Resnick v. American Dental Assn., 95 F.R.D. 372, 374-75 (N.D. Ill. 1982); Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 520-22 (E.D. Tenn. 1977). Several commentators have advocated extending the privilege to corporate self-evaluations. *See* Crisman & Mathews, *Limited Waiver of Attorney-Client Privilege and Work-Product Doctrine in Internal Corporate Investigations: An Emerging Corporate "Self-Evaluative" Privilege,* 21 AM. CRIM. L. REV. 123 (1983); Murphy, *The Self-Evaluative Privilege,* 7 J. CORP. L. 489 (1982); Case Comment, *The Attorney-Client Privilege, the Self-Evaluative Privilege, and* Diversified Industries, Inc. v. Meredith, 40 OHIO ST. L.J. 699, 722-25 (1979).

27. Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117 (N.D. Ga. 1971).

28. Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117, 118 (N.D. Ga. 1971).

> ance by employers . . . is essential for implementation of the policy of equal opportunity in employment. . . . If subjective materials constituting "self-critical analysis" are subject to disclosure during discovery, this disclosure would tend to have a "chilling effect" on an employer's voluntary compliance.[29]

Courts have divided on the issue of whether affirmative action plans should be discoverable. Despite the general breadth of modern discovery[30] and its particularly liberal application in Title VII suits,[31] some courts have recognized the self-critical analysis privilege and have denied discovery of plans entirely.[32] Others have allowed complete discovery[33] or allowed discovery of factual portions of plans.[34]

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29. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433 (E.D. Pa. 1978).

30. *See* notes 87-88 *infra* and accompanying text.

31. *See* notes 89-95 *infra* and accompanying text.

32. *E.g.,* Stevenson v. General Elec. Co., No. 80-3644, slip. op. (6th Cir. Aug. 16, 1982) (available on LEXIS, Labor library, Courts file), *affg.* 18 Fair Empl. Prac. Cas. (BNA) 746 (S.D. Ohio 1978); Jamison v. Storer Broadcasting Co., 511 F. Supp. 1286, 1296 (E.D. Mich. 1981); McClain v. Mack Trucks, Inc., 85 F.R.D. 53, 58 (E.D. Pa. 1979); Johnson v. Southern Ry. Co., 19 Empl. Prac. Dec. (CCH) ¶ 9076 (N.D. Ga. 1977); Sanday v. Carnegie-Mellon Univ., 11 Empl. Prac. Dec. (CCH) ¶ 10, 659 (W.D. Pa. 1975); Rodgers v. United States Steel Corp., 12 Fair Empl. Prac. Cas. (BNA) 100 (W.D. Pa. 1975); *cf.* Wehr v. Burroughs Corp., 20 Fair Empl. Prac. Cas. (BNA) 526, 527 (E.D. Pa. 1977) (denying discovery of evaluative reports prepared in course of preparing affirmative action plan).

33. *E.g.,* Witten v. A.H. Smith & Co., 100 F.R.D. 446, 451-54 (D. Md. 1984); Zahorik v. Cornell Univ., 98 F.R.D. 27, 32-33 (N.D.N.Y. 1983); EEOC v. Burlington Northern, Inc., No. 78C-269, slip. op. (N.D. Ill. Dec. 10, 1982) (available on LEXIS, Labor library, Courts file); Riggs v. United Parcel Serv., 24 Fair Empl. Prac. Cas. (BNA) 93 (E.D. Mo. 1980); Ford v. University of Notre Dame, 24 Empl. Prac. Dec. (CCH) ¶ 31,203 (N.D. Ind. 1980); Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907 (N.D. Cal. 1980); Ligon v. Frito-Lay, Inc., 19 Fair Empl. Prac. Cas. (BNA) 722 (N.D. Tex. 1978); Brown v. Ford Motor Co., 19 Empl. Prac. Dec. (CCH) ¶ 8969 (N.D. Ga. 1978); Ylla v. Delta Airlines, 18 Emp. Prac. Dec. (CCH) ¶ 6937 (N.D. Ga. 1977); EEOC v. ISC Fin. Corp., 16 Fair Empl. Prac. Cas. (BNA) 174, 179 (W.D. Mo. 1977); EEOC v. Quick Shop Mkts., Inc., 396 F. Supp. 133, 135-36 (E.D. Mo. 1975), *affd.,* 526 F.2d 802 (8th Cir. 1975); *cf. In re* Burlington Northern Inc., 679 F.2d 762 (8th Cir. 1982) (denying application for writ of mandamus to vacate discovery order for self-critical information regarding affirmative action program); Thompson v. Sun Oil Co., 523 F.2d 647 (8th Cir. 1975) (costs assessed against defendant for "inexcusable" behavior preventing discovery of plan); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 511 (D. Or. 1983) (affirmative action documents, except those defendant is required by law to file, not privileged); Hudson v. International Business Mach. Sys. Dev. Div., 22 Fair Empl. Prac. Cas. (BNA) 948 (S.D.N.Y. 1978) ("candid self-analysis" relating to race not privileged); Johnson v. W.H. Stewart Co., 75 F.R.D. 541 (W.D. Okl. 1976) (interrogatories on affirmative action program allowed). When the public policy arguments underlying the self-critical analysis privilege have been raised as a reason to deny release of affirmative action plans in reverse-FOIA suits, the plans have been released. *See* Bethlehem Steel Corp. v. Kreps, 23 Empl. Prac. Dec. (CCH) ¶ 30,904 (D. Md., 1980); Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292 (C.D. Cal. 1974), *vacated and remanded,* 20 Fair Empl. Prac. Cas. (BNA) 1422 (9th Cir. 1979).

34. *E.g.,* Mazzella v. RCA Global Communications, No. 83 Cir. 3716 (WCC), slip. op. (S.D.N.Y. Mar. 28, 1984) (available on LEXIS, Genfed library, Dist file); Nash v. City of Oakwood, 90 F.R.D. 633, 637 (S.D. Ohio 1981), *dismissed,* 541 F. Supp. 220 (S.D. Ohio 1982); National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272 (D. Conn. 1980); Roberts v. National Detroit Corp., 87 F.R.D. 30 (E.D. Mich. 1980); O'Connor v. Chrysler Corp., 86 F.R.D. 211 (D. Mass. 1980); Rosario v. New York Times Co., 84 F.R.D. 626 (S.D.N.Y. 1979); Parker v. Kroger Co., 19 Empl. Prac. Dec. (CCH) ¶ 8995 (N.D. Ga. 1977); Dickerson v. United States Steel Corp., 12 Empl. Prac. Dec. (CCH) ¶ 11,095 (E.D. Pa. 1976); *cf.* Penk v. Oregon State Bd.

The techniques courts have used have varied as widely as their results. Some have approved or disapproved a blanket privilege for all affirmative action plans.[35] Other courts have balanced the conflicting interests of the plaintiff and defendant in the individual case, often subjecting the disputed material to *in camera* inspection.[36] Still others have summarily held plans discoverable without discussing a self-critical analysis privilege at all.[37]

II. Conflicting Interests in the Discovery of Affirmative Action Plans

The decision to grant or deny discovery of affirmative action plans implicates conflicting interests between the plaintiff and defendant in a particular Title VII suit and between the different approaches adopted by the Executive Order and Title VII to eliminate employment discrimination. This Part first examines the interests that support the use of the self-critical analysis privilege to prevent discovery of affirmative action plans. It then discusses the strong countervailing interests that are advanced by allowing discovery, concluding that those latter interests weigh against the recognition of a privilege.

A. *Interests That Weigh Against Permitting the Discovery of Affirmative Action Plans*

1. *Effectiveness of Affirmative Action Plans*

Society has a great interest in effective affirmative action plans. They constitute a major mechanism for meeting the goal of Executive Order 11,246: "the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex or national origin, employed or seeking employment with Government contractors. . . ."[38] While the Executive Order has no statutory basis, and its effect has been controversial,[39] it has the force of law[40] and has

of Higher Educ., 99 F.R.D. 506 (D. Or. 1982) (employer must release nonself-evaluative portions of affirmative action compliance reports); IUE v. NLRB, 648 F.2d 18 (D.C. Cir. 1980) (no disclosure of affirmative action plan to union, but employer must provide statistical work force analysis); Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117 (N.D. Ga. 1971) (internal report used to prepare affirmative action plan privileged from discovery, but must provide factual and statistical information).

35. *Compare* EEOC v. Burlington Northern, Inc., No. 78C-269, slip op. (N.D. Ill. Dec. 10, 1982) (available on LEXIS, Labor library, Courts file) (refusing to recognize privilege, allowing discovery), *with* Rosario v. New York Times Co., 84 F.R.D. 626 (S.D.N.Y. 1979) (recognizing privilege, self-evaluation not discoverable).

36. *See* cases cited at note 132 *infra*.

37. *See, e.g.*, Riggs v. United Parcel Serv., 24 Fair Empl. Prac. Cas. (BNA) 93 (E.D. Mo. 1980); Ford v. University of Notre Dame, 24 Empl. Prac. Dec. (CCH) ¶ 31,203 (N.D. Ind. 1980); Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907 (N.D. Cal. 1980).

38. 41 C.F.R. § 60-1.1 (1984).

39. The Executive Order has been lauded as one of the most effective of all federal efforts to produce equal employment opportunity. *See* Note, *A Proposal for Reconciling Affirmative Action*

received support from Congress[41] and from civil rights groups.[42]

Employers argue that confidentiality is needed to encourage voluntary compliance with the Executive Order. This emphasis on voluntary compliance is based on the common-sense idea that self-criticism is always more valuable when done voluntarily than when done out of obligation. Government contractors may produce plans under a threat of sanctions which satisfy the letter of the regulations, but steps toward meeting nondiscrimination goals are more likely to be effective when employers are not worried about disclosure of unmet, more ambitious objectives.[43] Employers argue that confidentiality is necessary for a "good faith" effort[44] in drawing up plans because otherwise plans

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with Nondiscrimination Under the Contractor Antidiscrimination Program, 30 STAN. L. REV. 803 (1978). At the same time, enforcement of the order has been criticized as inadequate. *See* Galloway, *Administrative and Judicial Nullification of Federal Affirmative Action Law,* 17 SANTA CLARA L. REV. 559, 564-72 (1977). Studies in the early 1970's indicated a small increase in black male employment for governmental contractors as compared to noncontractors, but no gain for women or other minorities and no gain in occupational position. Heckman & Wolpin, *Does the Contract Compliance Program Work? An Analysis of Chicago Data,* 29 INDUS. & LAB. REL. REV. 544, 555-58 (1976); Goldstein & Smith, *The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors,* 29 INDUS. & LAB. REL. REV. 523, 534 (1976). The emphasis before the revision of the compliance regulations in 1971 was on eliminating racial, not sexual discrimination, which may explain the poor results for women. Goldstein & Smith, *supra,* at 536. Doubts have been expressed that with competitive bidding for contracts, there are no profits (economic rents) to provide incentives for a real change in minority employment. *See, e.g.,* Cain, *Comment,* 29 INDUS. & LAB. REL. REV. 572, 573 (1976). However, case studies suggest that large, profitable contracts facilitate affirmative action, especially in industries with a longstanding investment in specialized activities involving government contracts. Cost overruns, sole source bids and hope of future contracts also modify the competitive nature of the process. *Id.* at 573.

Even with proper incentives, affirmative action is difficult to apply in a recession. The concept of affirmative action was developed at a time when the work force was expanding, and hiring goals can have little effect during a period of layoffs. As the most recent hirees, the beneficiaries of affirmative action have often been the first workers laid off and the last recalled. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984) (Title VII bars modification of a consent plan providing affirmative hiring and promotion to protect minorities from layoffs under a bona fide seniority system).

40. *See, e.g.,* United States v. Local 189, United Papermakers, 282 F. Supp. 39, 43 (E.D. La. 1968), *aff'd.,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).

41. Congress rejected crippling modifications to the Executive Order program in considering the 1972 amendments to Title VII. *See* Jones, *Twenty-one Years of Affirmative Action: The Maturation of the Administrative Enforcement Process under the Executive Order 11,246 as amended,* 59 CHI-KENT L. REV. 67, 117-18 (1982). It gave positive statutory status to affirmative action obligations in § 718 of the amended act, Pub. L. No. 88-352, 78 Stat. 253 (1964), as amended Pub. L. No. 92-261, § 13, 86 Stat. 113 (1972) (codified as amended at 42 U.S.C. § 2000e-17 (1982)). Congress has also provided for affirmative action for additional classes of employees in the Rehabilitation Act of 1973, Pub. L. No. 93-112 §§ 501-04, 87 Stat. 390-94 (1973), and the Veterans Readjustment Act of 1974, Pub. L. No. 93-508, §§ 402, 403(a), 88 Stat. 1593 (1974) (currently codified at 38 U.S.C. §§ 2012 & 2014 (1982)).

42. In late 1976 the Department of Labor proposed revised rules which would have substantially modified the requirements for affirmative action programs. Civil rights groups opposed the changes and they were not enacted. *See* Galloway, *supra* note 39, at 560 n.11.

43. *See* Flanagan, *supra* note 20, at 565.

44. *See* note 7 *supra.*

will be written conservatively with one eye on potential disclosure.[45]

While confidentiality might enhance the quality of self-criticism, confidentiality alone cannot ensure that a plan will be effective in meeting Executive Order goals. Disincentives more powerful than the prospect of discovery often discourage employers from preparing an aggressive affirmative action plan. Affirmative action programs represent an effort to advance government goals by incorporating those goals into organizational planning. To the extent that the government goal of eradicating employment discrimination requires changes in an employer's existing procedures, there is bound to be pressure to prepare a conservative plan.[46] Also, in a typical institution, the responsibility for preparing affirmative action plans lies with a personnel department that may have little influence on management decisions.[47] There are usually few institutional rewards for achievement in the area of affirmative action and few sanctions for lack of achievement.[48] Affirmative action officers are typically caught between conflicting loyalties to minority and women employees whose interests they are attempting to advance, and to the managers of the organization who may not share a commitment to affirmative action.[49] Confidentiality may increase the quality of plans in spite of such powerful disincentives, but it is misleading to concentrate entirely on the importance of confidentiality to the exclusion of all the other factors that determine the effectiveness of affirmative action programs. Since confidentiality by itself is not sufficient to bring about rigorous self-criticism, it should not be sufficient to deny access to plans in the face of strong countervailing interests.

Another reason for stressing voluntarism in the preparation of af-

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45. *See* notes 135-36 *infra* and accompanying text.

46. *See* Flanagan, *supra* note 20, at 564.

47. *See* 2 U.S. COMMN. ON CIVIL RIGHTS, CONSULTATIONS ON THE AFFIRMATIVE ACTION STATEMENT OF THE U.S. COMMISSION ON CIVIL RIGHTS 105 (1982) (statement of George Neely) [hereinafter cited as CONSULTATIONS].

48. *Id.*

49. *See* CONSULTATIONS, *supra* note 47, at 107 (statement of Mark Chesler). Commissioner Ruckelshaus has characterized the effects of such conflicting loyalties on affirmative action programs:

> My experience with those in corporations who have responsibility for affirmative action programs is that they are pretty much trying to keep their heads down; they are trying very hard to have a plan that will keep their company out of court, unembarrassed, and not blotch their own career path, but anything that might jeopardize that is considered pretty high-risk stuff.

Id. at 94.

Even with full support from management, there are limits to what can be achieved with the analysis mandated for affirmative action plans. Utilization analysis compares the proportion of minority and women members in a job group to the proportion in the available labor pool, see notes 5-6 *supra*, but this "industrial model" does not work well for highly skilled jobs where qualifications are difficult to quantify and the availability of qualified individuals is hard to document. *See* Note, *supra* note 39, at 807 n.20. In addition, the wrong assumption as to the labor pool from which employees will be drawn can completely alter the result of the calculations. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

firmative action plans is the impossibility of policing all government contractors for compliance. The Office of Federal Contract Compliance Programs (OFCCP), which administers the Executive Order, has powerful sanctions at its disposal,[50] but enforcement has been limited by lack of staff[51] and, before 1978, by a policy of decentralization in which each individual contracting government agency was responsible for contract compliance.[52] OFCCP has concentrated its enforcement efforts on compliance reviews[53] in certain target industries and on pre-award audits of major prospective contractors, and has brought few enforcement proceedings.[54] In one observer's view, the "rapid development in law and regulation outpaced the mechanisms that enforce them."[55]

But the public is not entirely dependent on voluntary compliance to fulfill the requirements of the Executive Order program; existing enforcement power provides some incentive to comply. If OFCCP enforcement proves inadequate, one possibility for improvement would be to consolidate OFCCP functions with those of the Equal Employment Opportunity Commission (EEOC), which administers Title VII.[56] Commentators have also argued that enforcement could be improved by allowing private suits, either under a private right of action added to the Executive Order or on a third-party beneficiary theory.[57] In short, existing enforcement problems do not warrant dependence on confidentiality as a way to produce voluntary compliance. Indeed,

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50. Sanctions that may be imposed for noncompliance include cancellation, termination or suspension of a contract, and "debarment" from future contracts with any governmental agency. Exec. Order No. 11,246 § 209(a)(5), (a)(6), 3 C.F.R. 339 (1964-65 Comp.), *reprinted as amended in* 42 U.S.C. § 2000e app. at 19-24 (1981). For an illustration of the Secretary's broad power to invoke debarment, see Uniroyal, Inc. v. Marshall, 482 F. Supp. 364 (D.D.C. 1979) (upholding debarment as an appropriate administrative sanction for failure to comply with OFCCP pre-hearing discovery regulations). OFCCP may also recommend judicial enforcement proceedings pursuant to the Executive Order or Title VII. Exec. Order No. 11,246 § 209(a)(2), (a)(3).

51. *See* Jones, *supra* note 41, at 79.

52. *See* Galloway, *supra* note 39, at 562-63, 570. Contract compliance functions relating to equal opportunity were transferred to the Department of Labor by Exec. Order No. 12806, 43 Fed. Reg. 46,501 (1978).

53. 41 C.F.R. § 60-1.20 (1984). The reviews may involve an analysis of the contractor's employment practices, the adequacy of its affirmative action program and its compliance with the program. 41 C.F.R. § 60-1.20(a) (1984). Violations may include submission of an inadequate affirmative action plan or failure to submit a plan. 41 C.F.R. § 60-1.26(a)(1) (1984). When deficiencies or violations are found, the agency must try to encourage compliance through conciliation and persuasion. 41 C.F.R. § 60-1.20(b) (1984). When these procedures fail, administrative proceedings normally follow. 41 C.F.R. § 60-1.26(a)(2) (1984).

54. Compliance agencies issued show cause notices in only 1.2% of compliance reviews between July 1971 and March 1974. G.A.O., THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM FOR FEDERAL NONCONSTRUCTION CONTRACTORS CAN BE IMPROVED 27 (1975).

55. CONSULTATIONS, *supra* note 47, at 72 (statement of Eleanor Holmes-Norton).

56. *See* CONSULTATIONS, *supra* note 47, at 74 (statement of Eleanor Holmes-Norton); Jones, *supra* note 41, at 120-22.

57. Galloway, *supra* note 39, at 572-93; Jones, *supra* note 41, at 112-17. Courts have thus far refused to recognize a private right of action under Executive Order No. 11,246.

it is possible that the prospect of discovery — while it might thwart complete candor in the preparation of affirmative action plans — actually encourages otherwise uncooperative employers to put together a plan in a manner that is at least facially adequate.

2. *Fairness*

Employers who regard preparation of rigorous affirmative action plans as advancing their own interests will continue to do so even under a threat of disclosure. However, courts have suggested that a second reason for granting a self-critical analysis privilege to affirmative action plans is to "assure fairness to persons who have been required by law to engage in self-evaluation."[58]

Some commentators have assumed that the adverse effects of plan disclosure would fall most heavily on employers with the greatest commitment to affirmative action because they will set high goals that may be difficult to achieve.[59] However, an employer's current good faith efforts in drawing up a plan should not be used to deny relief to individuals who have been the victims of past discrimination. More importantly, it is likely that the burdens of disclosure will fall most heavily on those employers who have a poor employment record for minorities and women.

Employers have argued that information in affirmative action plans may hurt their competitive position by revealing their efficient use of labor, putting them at a disadvantage in competitive bidding, facilitating undesirable technology transfer and enabling employee raiding. In addition, revelations of anticipated layoffs and applicant flow data may damage employee morale and discourage qualified minority and female applicants.[60] Another concern is that the plaintiff may be engaged in a fishing expedition for charges and the discussion

58. O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980). Materials protected have generally been those prepared for mandatory government reports. Webb. v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978). *Compare* Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506 (D. Or. 1982) (privilege recognized for self-evaluative portions of required affirmative action reports), *with* Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 511 (D. Or. 1983) (no privilege for documents unless filing is required by law). Courts have, however, recognized the self-critical analysis privilege outside the Title VII context despite the fact that the party preparing the report was under no obligation to do so. *See* notes 21, 24-25 *supra* and accompanying text. Indeed, one might argue that the privilege ought to extend only to materials prepared for *non*-mandatory reports. *See* note 70 *infra* and accompanying text.

59. *See, e.g.*, Flanagan, *supra* note 20, at 566. While an employer does have flexibility in setting goals and timetables consistent with a "good faith effort," deficiencies are measured not against the goals, but against full utilization of minorities and women. *See* notes 6-7 *supra*.

60. *See, e.g.*, CNA Fin. Corp. v. Donovan, 28 Emp. Prac. Dec. (CCH) ¶ 32,402 (D.D.C. 1981); Burroughs Corp. v. Brown, 501 F. Supp. 375, 381 (E.D. Va. 1980), *vacated and remanded sub nom* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981). Competitive disadvantage arguments are typically made in reverse-FOIA suits, where protective orders are unavailable, *see* notes 157-58 *infra* and accompanying text, but discovery has also been limited to factual information to avoid "adverse impact" on the employer's business operations. National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272, 279 (D. Conn. 1980).

of deficiencies in the plan may subject the employer to further suits. A final fairness argument is that release of a plan is unnecessary if the information needed by the plaintiff is available from other sources.[61]

Such concerns for fairness can be satisfied without completely denying discovery of affirmative action plans. Courts have broad discretion to limit discovery to "relevant" material.[62] They can also control the use of discovered materials by conditioning release with a protective order.[63]

3. *Comparison to Other Applications of a Self-critical Analysis Privilege*

Employers originally invoked the self-critical analysis privilege in employment discrimination suits on the theory that the interests protected are analogous to those protected by the privilege in other contexts.[64] The soundness of the privilege is disputed in all of its applications,[65] but even if the privilege were regarded as legitimate in other areas, its use in employment discrimination suits would represent an unwarranted expansion into a fundamentally different context. One difference is that documents most often entitled to the privilege, such as medical malpractice and police investigatory reports, typically focus on a single event, while affirmative action programs are part of a continuous process with yearly updates mandated by a federal agency.[66] As such, affirmative action programs are more routine and institutionalized and do not depend on the protections and incentives arguably necessary to encourage more ad hoc self-investigations.

The purposes and uses of affirmative action plans also differ from those of investigatory reports. The latter typically serve internal purposes and are destined solely for internal use. In contrast, affirmative action plans are prepared to comply with federal regulations and with the knowledge that they must be submitted to OFCCP on request.[67]

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61. However, only factual data, not employer self-criticism, is likely to be duplicated elsewhere. Even in cases where the court has noted that the factual information was available elsewhere, *e.g.*, Stevenson v. General Elec. Co., No. 80-3644, slip op. (6th Cir. Aug. 16, 1982) (available on LEXIS, Labor library, Courts file); Wehr v. Burroughs Corp., 20 Fair Empl. Prac. Cas. (BNA) 526, 527 (E.D. Pa. 1977); Sanday v. Carnegie-Mellon Univ., 11 Empl. Prac. Dec. (CCH) ¶ 10,659 (W.D. Pa. 1975), these alternative sources of raw data may be irrelevant if the plaintiff cannot afford to perform the statistical analyses himself. *See* notes 105-06 *infra* and accompanying text.

62. *See* notes 90, 92, 93-95 *infra* and accompanying text.

63. *See* notes 138-58 *infra* and accompanying text.

64. *See* Banks v. Lockheed-Georgia Co., 4 Fair Empl. Prac. Cas. (BNA) 117, 118 (N.D. Ga. 1971); *see also* Rosario v. N.Y. Times, 84 F.R.D. 626, 631 (S.D.N.Y. 1979).

65. *See* notes 21-26 *supra* and accompanying text.

66. 41 C.F.R. § 60-2.14 (1984).

67. This purpose was stressed in Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979), where the employer asserted a self-critical analysis privilege against FOIA disclosure of its plans. The court found the employer had notice of their purpose and denied the privilege.

> [U]nlike the situation in *Bredice*, the [affirmative action] reports . . . are not made solely for

Once the plans are in OFCCP files, they are available to the EEOC[68] or they may be released in response to a FOIA request.[69] Because the plans are prepared for an outside purpose and with clear notice that they may not remain solely in the employer's control, there is less reason to protect confidentiality than in the case of purely internal proceedings.

Another important distinction is that self-criticism is *required* by government regulation and sanctions are available to enforce the requirements.[70] In contrast, no such measures are brought to bear on the other, more "voluntary" reports protected by the privilege. OFCCP regulations and sanctions provide an incentive for self-criticism in affirmative action plans that lessens the need for confidentiality to encourage effective evaluation and weakens the argument for extending the privilege to this context.

A final reason for distinguishing the application of the privilege to affirmative action plans from its application in the paradigm cases is that determining exactly what is "self-evaluative" is less straightforward here than in other contexts. An entire medical committee report is "self-evaluative," but an affirmative action plan is a blend of statistics and prose, often with no clear lines between self-evaluation and fact.[71] For example, much of a plan may be numerical, but this does not ensure that the content is purely factual. Certainly a plan's comparison of utilization and availability of employees, while it may be presented in numerical terms,[72] forms the basis of "self-evaluation."

Courts that have recognized a self-critical analysis privilege have dealt with this ambiguity between fact and self-evaluation in various ways. Some courts have allowed the employer to remove the self-criticism without court inspection.[73] This is an unsatisfactory solution be-

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internal use. . . . [Affirmative action plans] and other documents are submitted to the OFCCP with the express understanding that they will be used in the administration of Executive Order 11246 and the Civil Rights Act.

609 F.2d at 907; *see also* Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977), *cert. denied,* 435 U.S. 995 (1978). Since private plaintiffs play a "private attorney general" role in enforcing Title VII, *see* notes 83-84 *infra* and accompanying text, they should arguably fall under the same umbrella of notice.

68. Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979).

69. *See* note 10 *supra.*

70. *See* note 50 *supra* and accompanying text. The sanctions available were emphasized in a FOIA suit that rejected the argument that plans need to be protected from disclosure as a matter of public policy. The court noted that the employer was subject to a statutory duty to file the information and stated that failure to file "would be an act of bad faith and expose the contractor to penalties." Hughes Aircraft Co. v. Schlesinger, 384 F. Supp. 292, 296 (C.D. Cal. 1974), *vacated and remanded,* 20 Fair Empl. Prac. Cas. (BNA) 1422 (9th Cir. 1979).

71. *See* notes 5-8 *supra* and accompanying text.

72. *See* note 6 *supra.*

73. *E.g.,* Mazzella v. RCA Global Communications, No. 83 Civ. 3716 (WCC), slip op. (S.D.N.Y. Mar. 28, 1984) (available on LEXIS, Genfed library, Dist file); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506, 507 (D. Or. 1982); Roberts v. National Detroit Corp., 87 F.R.D. 30, 32 (E.D. Mich. 1980).

cause of the potential for employer abuse, as illustrated by an employer's claim that pure statistics on numbers of applicants constitute self-criticism.[74] Given the lack of cooperation between adversaries in many proceedings, other courts have concluded that the exercise of the privilege requires monitoring. These courts have examined the plans *in camera* and have removed damaging material themselves.[75] This procedure is often a substantial drain on court resources[76] and some courts have refused to recognize the privilege based in part on concerns about the burden of separating fact from self-criticism and the efficient use of court time.[77] Despite an oft quoted conclusion by one court that "only subjective, evaluative materials have been protected; objective data contained in those same reports in no case have been protected,"[78] some courts have extended the privilege to cover the entire plan.[79] This approach eliminates the need to distinguish fact and self-criticism, but goes beyond the scope of the privilege to restrict discovery of materials not a part of the self-criticism. It also places an unjustified burden on the plaintiff where factual information in the plan is unavailable from other sources.[80]

B. *Interests That Weigh in Favor of Permitting the Discovery of Affirmative Action Plans*

1. *The Mandates of Title VII of the Civil Rights Act*

The public has a strong interest in achieving Title VII's goal of eliminating employment discrimination.[81] A private plaintiff's interest in remedying a specific violation overlaps with this public interest be-

74. *See* EEOC v. Sears, Roebuck & Co., 22 Fair Empl. Prac. Cas. (BNA) 468 (M.D. Ala. 1980).

75. *E.g.*, O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980); Rosario v. New York Times Co., 84 F.R.D. 626, 631 (S.D.N.Y. 1979).

76. *See, e.g.*, Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980), *vacated and remanded sub nom.* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981) (FOIA disclosure of workplace data; *in camera* inspection of more than 3,300 pages to remove material which would damage competitive position).

77. *E.g.*, Zahorik v. Cornell Univ., 98 F.R.D. 27 (N.D.N.Y. 1983); EEOC v. Burlington Northern, Inc., No. 78c-269, slip. op. (N.D. Ill. Dec. 10, 1982) (available on LEXIS, Labor library, Courts file).

78. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 434 (E.D. Pa. 1978).

79. *See* note 32 *supra*.

80. *See* note 61 *supra* and accompanying text.

81. Under Title VII,

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1976).

cause the private right of action is an extremely important part of Title VII enforcement. Although the EEOC was granted direct enforcement power in 1972, Congress retained the private right of action, primarily to ensure individuals an opportunity to press their cases.[82] However, the Supreme Court has recognized a broader, public role for private suits, noting that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII . . . . In such cases, the private litigant not only redresses his own injury but vindicates the important congressional policy against discriminatory employment practices."[83] The Court has stated that the private plaintiff should be considered a "private attorney general" whose role in enforcing the Title VII ban on discrimination is parallel to that of the EEOC.[84] Private suits have greatly increased the number of legal actions brought and have thus stimulated the rapid development of Title VII.[85] Indeed, although the EEOC often played a critical role in supplying money or expertise, almost all the major Title VII cases that shaped and advanced the law have been brought by individuals, not by the government.[86]

Liberal discovery is one means of encouraging private suits. While discovery under the Federal Rules of Civil Procedure is broad in scope[87] and has been liberally interpreted,[88] the rules have been applied even more broadly in Title VII suits.[89] If the material sought is

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82. The retention of the private right of action . . . is intended to make clear that an individual aggrieved by a violation of Title VII should not be forced to abandon the claim merely because of a decision by the Commission or the Attorney General as the case may be, that there are insufficient grounds for the Government to file a complaint. . . .

It is hoped that recourse to the private lawsuit will be the exception and not the rule. . . . However, as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief. 118 Cong. Rec. 7565 (1972) (statement of Rep. Perkins).

83. Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) (citation omitted).

84. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978); *cf.* Newman v. Piggie Park Enter., 390 U.S. 400 (1968) (private attorney general concept in Title II suit).

85. *See* CONSULTATIONS, *supra* note 47, at 72 (statement of Eleanor Holmes-Norton).

86. *See id.* at 73; Belton, *A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964*, 31 VAND. L. REV. 905, 924-52 (1978).

87. Federal Rule of Civil Procedure 26(b)(1) provides:

(b) DISCOVERY SCOPE AND LIMITS. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

88. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 177 (1979); Schlagenhauf v. Holder, 379 U.S. 104, 114-15 (1964); Hickman v. Taylor, 329 U.S. 495, 507 (1947).

89. *See, e.g.*, Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973); Milner v. National School of Health Tech., 73 F.R.D. 628, 632 (E.D. Pa. 1977). Courts frequently impose limits that restrict discovery with reference to the effective date of Title VII. *See, e.g.*, Georgia

not privileged, discovery can be denied when the material is not relevant to the suit[90] or when production of the information would be burdensome.[91] However, courts have wide discretion over the boundaries of relevance and burden. They have exercised this discretion to permit discovery in Title VII suits both when the material sought did not pertain directly to the plaintiff's claim, but might indicate broader discrimination,[92] and when discovery required the employer to expend large amounts of time or money.[93] Courts have frequently permitted classwide discovery before the determination of class certification[94] or

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Power Co. v. EEOC, 412 F.2d 462 (5th Cir. 1969); Scott v. Douglas & Lomason Co., 3 Empl. Prac. Dec. (CCH) ¶ 8006 (N.D. Miss. 1970). Discovery has also been limited to five years before the alleged violation. *E.g.*, Cormier v. PPG Indus., 452 F. Supp. 594, 596 (W.D. La. 1978), *dismissed*, 519 F. Supp. 211 (W.D. La. 1981); Evans v. Local 2127, IBEW, 313 F. Supp. 1354, 1360 (N.D. Ga. 1969).

90. *See, e.g.*, Johnson v. Southern Ry, 25 Fair Empl. Prac. Cas. (BNA) 714 (N.D. Ga. 1977) (plaintiff limited to discovery concerning blacks); Ylla v. Delta Air Lines, 25 Fair Empl. Prac. Cas. (BNA) 754 (N.D. Ga. 1977) (race information not discoverable when discrimination claim was based on national origin); King v. Georgia Power Co. 50 F.R.D. 134, 138 (N.D. Ga. 1970) (interrogatory asking for race and seniority of all bidders for all vacancies limited to vacancies for which members of the affected class had bid); Hicks v. Crown Zellerbach Corp., 49 F.R.D. 184, 194 (E.D. La. 1968) (denying oral dispositions for information held irrelevant).

91. *See, e.g.*, Marshall v. Westinghouse Elec. Corp., 576 F.2d 588 (5th Cir. 1978) (interrogatories covering 7,500 employees in 32 districts burdensome); Kolta v. Tuck Indus., 20 FED. R. SERV. 2D (CALLAGHAN) 1049 (S.D.N.Y. 1975) (interrogatories requiring nearly 250 responses burdensome); Jones v. Holy Cross Hosp. Silver Spring, Inc., 64 F.R.D. 586, 591 (D. Md. 1974) (70 interrogatories, each with 2 to 23 subparts, overbroad); Carr v. Conoco Plastics, Inc., 1 Fair Empl. Prac. Cas. (BNA) 839, 843 (N.D. Miss. 1969) (information on some 3,000 applicant referrals burdensome); Evans v. Local 2127, IBEW, 313 F. Supp. 1354, 1360 (N.D. Ga. 1967) (interrogatories unduly burdensome).

92. *See, e.g.*, Queen v. Dresser Indus., 21 Fair Empl. Prac. Cas. (BNA) 757, 759 (D. Md. 1977) (information on nonbargaining unit employees discoverable); National Org. for Women v. Minnesota Mining & Mfg. Co., 73 F.R.D. 467, 472 (D. Minn. 1977) (discovery company-wide for all employees rather than limited to female hourly employees at two plants); Blank v. Sullivan & Cromwell, 16 Fair Empl. Prac. Cas. (BNA) 87, 88 (S.D.N.Y. 1976) (plaintiff entitled to information on policies for advancing law firm associates to partnership in case alleging sex discrimination in associate hiring, even though factors involved in partnership decision differ); Marshall v. Electric Hose & Rubber Co., 68 F.R.D. 287, 295-96 (D. Del. 1975) (defendant required to respond to discovery question on why operations were transferred).

93. *See, e.g.*, Zahorik v. Cornell Univ., 98 F.R.D. 27, 35-36 (N.D.N.Y. 1983) (burden imposed by defendant's disjointed record-keeping system did not prevent discovery); McLendon v. M. David Lowe Personnel Servs., 15 Fair Empl. Prac. Cas. (BNA) 250, 253 (S.D. Tex. 1977) (interrogatory seeking a list by race and/or national origin of all persons who applied unsuccessfully for a certain position during a four-year period that would take 1,250 to 2,500 hours to compile); Foster v. Boise-Cascade, Inc., 10 Fair Empl. Prac. Cas. (BNA) 1287, 1290 (S.D. Tex. 1975) (defendant must compile response to interrogatory rather than make files available when the burden is substantially less than that which would be imposed on plaintiff); Logan v. General Fireproofing Co., 2 Empl. Prac. Dec. (CCH) ¶ 10,155 (W.D.N.C. 1970).

94. *See, e.g.*, Huff v. N.D. Cass Co., 485 F.2d 710, 713 (5th Cir. 1973) (en banc) ("The court . . . often . . . permit[s] discovery relating to the issues involved in maintainability."); Zahorik v. Cornell Univ., 98 F.R.D. 27 (N.D.N.Y. 1983); Johnson v. Southern Ry., 19 Empl. Prac. Dec. (CCH) ¶ 9076 (N.D. Ga. 1977); Lim v. Citizens Sav. & Loan Assn., 430 F. Supp. 802, 809 (N.D. Cal. 1976). *But see* National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272 (D. Conn. 1980); Cutner v. Atlantic Richfield Co., 16 Fair Empl. Prac. Cas. (BNA) 743 (E.D. Pa. 1977). *See generally* 7A C. WRIGHT & A. MILLER, *supra* note 21, at § 1785; FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION § 1.40 (1980).

have allowed inquiry which might tend to establish a pattern of discrimination, even in individual cases.[95]

Courts have granted this particularly broad discovery as a means of enhancing the effectiveness of private suits. The private attorney general role of the plaintiff increases the importance of disclosure[96] and has been cited to justify permitting discovery with a breadth comparable to that of an EEOC investigation.[97] Broad discovery also serves the individual interests of a private plaintiff. An employee is at a disadvantage in documenting employment discrimination and plaintiffs often have difficulty in carrying their burden of proof in Title VII cases.[98] Permitting broad discovery represents an attempt to aid plaintiffs by improving their access to adequate documentation. Moreover, a victim of employment discrimination will often have financial difficulty bringing a claim[99] and courts have recognized the need for broad discovery when the financial capabilities of a Title VII plaintiff are limited compared to those of a defendant.[100] Finally, the prospect that substantial information may be obtained through discovery may assist a plaintiff in obtaining counsel on a contingent-fee basis.[101]

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95. *See, e.g.*, Lieberman v. Gant, 630 F.2d 60, 68 (2d Cir. 1980); Rich v. Martin Marietta Corp., 522 F.2d 333, 344 (10th Cir. 1975); Mazzella v. RCA Global Communications, No. 83 Civ. 3716 (WCC), slip op. (S.D.N.Y. Mar. 28, 1984) (available on LEXIS, Genfed library, Dist file); Brown v. Ford Motor Co., 19 Empl. Prac. Dec. (CCH) ¶ 8969 (N.D. Ga. 1978); Johnson v. W.H. Stewart Co., 75 F.R.D. 541, 543 (W.D. Okla. 1976).

96. Wood v. Breier, 54 F.R.D. 7, 10-11 (E.D. Wis. 1972).

97. Burns v. Thiokol Chem. Corp., 483 F.2d 300, 305 (5th Cir. 1973) ("Any information relevant — in a discovery sense — to an EEOC investigation is likewise relevant to the private attorney-general, either in his individual role or in his capacity as the claimed representative of a class."); *see also* EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 602-03 (1981) (private attorney general role cited in holding that charging party may view EEOC investigatory file on his case).

Some commentators have expressed concern that disclosures to private plaintiffs may impede EEOC conciliation and negotiation. *See*, Comment, *Access to EEOC Files Concerning Private Employers*, 46 U. CHI. L. REV. 477, 479-80 (1979). Because the employer may be motivated to negotiate in order to avoid litigation, its incentive to settle may decrease if it continues to face private suits. Johnson v. Railway Express Agency, 421 U.S. 454, 461 (1975) ("We recognize . . . that the filing of a lawsuit might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance . . . ."). However, the practical effect disclosing affirmative action plans has on conciliation is not clear. Katz, *Investigation and Conciliation of Employment Discrimination Charges Under Title VII: Employers' Rights in an Adversary Process*, 28 HASTINGS L.J. 877 (1977). The Supreme Court has recently rejected this concern and endorsed disclosure of EEOC investigative materials to private plaintiffs. The Court suggested that disclosure could improve the Commission's ability to solve disputes informally. *Associated Dry Goods Corp.*, 449 U.S. at 601 ("A party is far more likely to settle when he has enough information to be able to assess the strengths and weaknesses of his opponent's case as well as his own.") (citation omitted).

98. *See, e.g.*, Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976).

99. *See* Comment, *supra* note 97, at 487.

100. *See, e.g.*, McLendon v. M. David Lowe Personnel Servs., 15 Fair Empl. Prac. Cas. (BNA) 250, 253 (S.D. Tex. 1977); King v. Georgia Power Co., 50 F.R.D. 134, 136 (N.D. Ga. 1970).

101. *See* Comment, *supra* note 97, at 487.

2. *Usefulness of Affirmative Action Plans as Evidentiary Tools*

Permitting broad discovery in general, and discovery of affirmative action plans in particular, is one way to encourage effective private suits. The plans provide both statistical and nonstatistical information which can aid a plaintiff in meeting the burden of proof in Title VII cases.

Statistics are crucial in cases brought under the adverse impact theory of discrimination, where the plaintiff must establish a prima facie case that the employer's practices have a substantially disproportionate discriminatory effect on a protected class.[102] While statistics are not as important in individual disparate treatment cases,[103] plaintiffs often rely on statistics for proof in class actions.[104]

The costs of bringing suit have increased because the courts have substantially refined the quality of statistical proof needed to establish a Title VII case.[105] However, these costs may be reduced by permitting discovery of affirmative action plans which provide extensive documentation and comparison of the employer's work force and the available labor force.[106] While this data will probably be presented in a light most favorable to the employer and most plaintiffs would prefer to calculate their own statistics from original sources such as personnel records,[107] the plans can be useful to a plaintiff with limited finan-

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102. The inquiry in disparate impact cases focuses on whether a selection device (such as a test) or other criterion for employment or promotion disqualifies a disproportionate number of members of the protected class. If the employee can show such impact, he or she has established a prima facie case and the employer must demonstrate that the test is job-related or otherwise a business necessity to escape liability. *See* Griggs v. Duke Power Co., 431 U.S. 424 (1971). Proof of a discriminatory motive is not required. *See, e.g.,* International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. at 432. Plaintiffs commonly introduce pass/fail comparisons for a test or population/work force comparisons for other criteria to establish a prima facie case. *See, e.g.,* Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

103. "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (citations omitted). *See generally* B. SCHLEI & P. GROSSMAN, *supra* note 10, at 13-22. The Supreme Court has established a tripartite procedure for analyzing disparate treatment cases: (1) the plaintiff must establish a prima facie case, (2) the defendant must offer a nondiscriminatory reason for its actions, and (3) the plaintiff must establish that this supposedly legitimate reason was a pretext to mask an illegal motive. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804 (1973). The case most often hinges on the plaintiff's ability to show that the reason for the different treatment offered by the employer was a pretext. Comparative evidence showing that persons in a different protected group were treated more favorably in a comparable factual situation is normally dispositive. *See* B. SCHLEI & P. GROSSMAN, *supra* note 10, at 1317-20.

104. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 336-38 (1977).

105. *See* CONSULTATIONS, *supra* note 47, at 73 (statement of Eleanor Holmes-Norton). Even the smallest class action will cost a minimum of $15,000 for statistical work alone. *Id.*

106. *See* note 5 *supra*.

107. Statistics contained in affirmative action plans are broken down by job groups, which may mask disparities that would appear in an analysis of individual jobs. For example, if a job

cial resources who would be unable to perform a sophisticated statistical analysis.

Although statistical evidence dominates adverse impact cases and class disparate treatment cases, plaintiffs often introduce nonstatistical evidence in support of the statistical claim. Such evidence is particularly important to the plaintiff when the employer has used statistics to reach a conflicting conclusion or when the statistical sample or disparities between groups are small, thus weakening the force of the statistical conclusions.[108] Part of the value of self-criticism is that any conclusions that do support a plaintiff's case carry the authority of the employer.[109] Such conclusions may also be useful to impeach the employer's witnesses.

In addition to the information contained in a plan, the quality of affirmative action efforts and the effectiveness of the plan itself are important forms of nonstatistical proof. Such proof is important in establishing[110] or rebutting[111] a prima facie case of employment

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which is largely filled by minorities is combined in a job group with a job dominated by white males, the disproportionate representation will balance out for the job group as a whole.

108. *See, e.g.*, Taylor v. Teletype Corp., 648 F.2d 1129, 1135 & n.13 (8th Cir. 1981) (where statistics are significant, but not of a magnitude that "clearly demonstrates intentional discrimination," nonstatistical evidence may be used to support prima facie case in disparate treatment class action), *cert. denied*, 454 U.S 969 (1981).

109. *See* Flanagan, *supra* note 20, at 558-59.

110. *See, e.g.*, Taylor v. Teletype Corp., 648 F.2d 1129, 1135 n.14 (8th Cir. 1981) (evidence that defendant failed to live up to its affirmative action program and failed to support its affirmative action director used to support plaintiff's disparate treatment case), *cert. denied*, 454 U.S. 969 (1981); Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169, 179 (1st Cir.) (ineffectiveness of defendant's affirmative action efforts relevant to discriminatory intent in individual disparate treatment case), *vacated on other grounds*, 439 U.S. 24 (1978); Greenspan v. Automobile Club, 495 F. Supp. 1021, 1039 (E.D. Mich. 1980) (evidence of employer's ambivalent attitude toward affirmative action program and inadequacy of plan for sex discrimination used to support inference of discrimination); *cf.* Association Against Discrimination in Employment v. City of Bridgeport, 479 F. Supp. 101, 106-07 (D. Conn. 1979) (defendant's refusal to recruit minorities coupled with strong statistical evidence of discrimination), *aff'd. in relevant part*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

111. *See, e.g.*, Coser v. Moore, 739 F.2d 746, 751 (2d Cir. 1984) (comprehensive affirmative action plan evidence of "intent to eliminate gender as an employment criteria"; "antithesis of pattern and practice of discrimination"); EEOC v. Datapoint Corp., 570 F.2d 1264, 1270 (5th Cir. 1978) (aggressive recruiting of minorities and effective affirmative action programs supported employer's defense); Pouncy v. Prudential Ins. Co., 499 F. Supp. 427, 445-46 (S.D. Tex. 1980) (evidence of defendant's aggressive affirmative action program and programs to train supervisors regarding equal employment obligations offered as evidence by defendant), *aff'd.*, 668 F.2d 795 (5th Cir. 1982); Rich v. Martin Marietta Corp., 467 F. Supp. 587, 597-98 (D. Colo. 1979) (evidence of affirmative action efforts part of employer's defense); *cf.* Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC, 492 F.2d 656, 658 (D.C. Cir. 1974) (FCC license renewal case finding that "a disparity that is reasonable in light of a recruitment policy might not be reasonable in its absence"); Stone v. FCC, 466 F.2d 316, 329-30 (D.C. Cir. 1972) (statistical evidence of disparities insufficient to establish prima facie case against license renewal in light of defendant's aggressive affirmative action policies).

Courts have also viewed evidence of affirmative recruitment and promotion policies as indicating a lack of intent to discriminate under the greater intent requirements of a § 1981 disparate impact case. *See* Washington v. Davis, 426 U.S. 229 (1976); Vanguard Justice Socy., Inc. v. Hughes, 471 F. Supp. 670 (D. Md. 1979); Dickerson v. United States Steel Corp., 472 F. Supp.

discrimination. Moreover, the plan itself is especially crucial nonstatistical evidence in a reverse discrimination suit. Since the Supreme Court upheld a voluntary affirmative action plan against a claim of reverse discrimination in *United Steelworkers of America v. Weber*,[112] much of the subsequent litigation has focused on the content of the employer's plan.[113]

Thus, both the statistical and nonstatistical portions of a plan may be helpful in establishing a plaintiff's case, either by demonstrating a prima facie case of discrimination or by showing that the employer's "legitimate" reason for using a procedure with disparate impact is merely a pretext for intentional discrimination. In addition, permitting discovery of the plan may be necessary to a plaintiff's preparation for trial if it will form a part of the employer's defense.

The nature and strength of the conflicting interests of Title VII plaintiffs and defendants are important considerations in determining whether or not to permit discovery of affirmative action plans. Plaintiffs in a Title VII suit share the need of all litigants for sufficient information to ensure a full, fair consideration of the issues. These concerns are especially strong in the Title VII context, where the employer can draw on vastly superior resources and data.[114] Employers, on the other hand, have legitimate concerns in protecting information in the plans from competitors.[115] The public has interests in encouraging both affirmative action and enforcement of Title VII. These competing interests all deserve consideration; the pattern of discovery selected must reflect not only the importance of those interests, but also the full range of methods available to accommodate them.

III. Alternative Approaches to the Discovery of Affirmative Action Plans

Courts can take several approaches to the discovery of affirmative action plans. Recognition of an absolute privilege[116] would provide

1304 (E.D. Pa. 1978), *vacated in part on other grounds sub nom.* Worthy v. United States Steel Corp., 616 F.2d 698 (3d Cir. 1980).

112. 443 U.S. 193 (1979).

113. *See, e.g.*, Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424 (8th Cir. 1981) (plaintiff claiming plan violates Title VII by preferring minorities over women); Lehman v. Yellow Freight Sys., Inc., 651 F.2d 520 (7th Cir. 1981) (affirmative action efforts must include safeguards to insure fair treatment of all); Parker v. Baltimore & Ohio R.R., 25 Fair Empl. Prac. Cas. (BNA) 889 (D.C. Cir. 1981) (requiring evidence that plan meets *Weber* standards); Jurgens v. Thomas, 30 Empl. Prac. Dec. (CCH) ¶ 33,090 (N.D. Tex. 1982) (same); McLaughlin v. Great Lakes Dredge & Dock Co., 495 F. Supp. 857 (N.D. Ohio 1980) (same). *But see* Jamison v. Storer Broadcasting Co., 511 F. Supp. 1286, 1295 (E.D. Mich. 1981) (limiting admissibility of affirmative action material so that defendant will not have to "defend, collaterally, the bonafides of the affirmative action plan" in addition to defending discrete discriminatory action alleged by plaintiff; citing "high potential for misleading and confusing the fact finder").

114. *See* notes 98-101 *supra* and accompanying text.

115. *See* note 60 *supra* and accompanying text.

116. An "absolute" or "fixed" evidentiary privilege is one that, once recognized, is inviolate

the most secure protection from discovery but would balance the competing interests entirely in favor of confidentiality and the employer. At the other end of the spectrum, plans could be uniformly released without any protections, thus achieving the same results as when the plans are obtained through FOIA. This would balance the interests entirely in favor of the private plaintiff's interest in enforcing Title VII. Plans could also be protected with a qualified privilege,[117] which would require a balancing of the relevant interests in each individual case.[118] This Note argues that courts can best accommodate the conflicting interests implicated in discovery of affirmative action plans by permitting the discovery of such plans under a protective order.

A. *An Absolute Self-critical Analysis Privilege for Affirmative Action Plans*

Despite a general judicial trend toward restricting privileges,[119]

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except when waived. Examples include the attorney-client, physician-patient, marital and priest-penitent privileges. The traditional justification for such privileges, which unlike the majority of evidentiary rules do not aid in the search for truth by safeguarding the quality of evidence, is that public policy requires the safeguarding of communications necessary to certain relationships. *See* McCORMICK ON EVIDENCE § 72, at 171 (E. Cleary 3d ed. 1984). "[T]he achievement of [these] utilitarian objectives requires privileges which are essentially absolute in character." *Id.* § 77, at 186.

117. A "qualified," "limited" or "conditional" privilege may be overcome by public interests that require disclosure or by a showing of sufficient hardship on the part of the party seeking to introduce the evidence. The most commonly accepted qualified privileges are used to protect grand jury transcripts, trade secrets and executive or official government information. *See* Case Comment, *Civil Procedure: Self-Evaluative Reports — A Qualified Privilege in Discovery?*, 57 MINN. L. REV. 807, 812 & n.20 (1973). A privilege for informers has also been described as a limited privilege. *See* M. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES § 7.05, at 7-14 (1982).

118. *See* notes 131-36 *infra* and accompanying text. *See generally* Note, *supra* note 10.

119. Federal courts have narrowly interpreted existing evidentiary privileges and have been hostile to the development of new ones. *See, e.g.*, Trammel v. United States, 445 U.S. 40 (1980) (limiting the marital communications privilege); Herbert v. Lando, 441 U.S. 153 (1979) (refusing to recognize an editorial privilege); Richards of Rockford, Inc. v. Pacific Gas & Elec. Co., 71 F.R.D. 388, 389 n.2 (N.D. Cal. 1976) (federal court may not create a new federal evidentiary privilege unless the privilege "rises to the constitutional level"). The Supreme Court has recently warned against the expansion of privilege, reasserting that "these exceptions to the demand for every man's evidence are not lightly created nor expansively constructed, for they are in derogation of the search for truth." United States v. Nixon, 418 U.S. 683, 710 (1974) (footnote omitted).

However, in adopting the Federal Rules of Evidence in 1975, Congress rejected a narrow enumerated list of privileges and adopted a more flexible rule. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶¶ 501-509 (1982). It thus indicated its "affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . . .' " Trammel v. United States, 445 U.S. 40, 47 (1980) (quoting 120 Cong. Rec. 40891) (statement of Rep. Hungate)); *see also* S. REP. NO. 1277, 93d Cong., 2d Sess. 13, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7059 ("[O]ur action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."). Federal Rule of Evidence 501 provides:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be *interpreted by the courts of the*

some commentators have urged the recognition of an absolute privilege to protect self-critical analysis from discovery. Those commentators reason that an absolute privilege is the only way to protect confidentiality.[120] This solution is inappropriate because it does not recognize countervailing public interests in permitting discovery and at the same time would fail to provide the complete confidentiality that employers seek.

An absolute privilege would place undue weight on society's interest in encouraging affirmative action plans and in meeting the goals of Executive Order 11,246, to the detriment of the public interest in the private enforcement of Title VII. Such a one-sided balancing of the public interest is inappropriate in the face of the strong federal policies served by such suits:

> [F]ederal equal opportunity laws manifest a strong policy in favor of eradicating all vestiges of employment discrimination . . . . In furtherance of this policy, plaintiffs must be permitted to obtain information sufficient to enable them to prove employment discrimination where such discrimination exists. To the extent that the defense of "self-critical analysis" conflicts with a plaintiff's ability to gather information necessary to prove his or her case, the recognition of such a defense hampers the enforcement of federal equal employment laws.[121]

To a certain extent, the goal of Title VII and the Executive Order is the same: to eradicate discrimination. However, not only are the means chosen to achieve that goal different under the two programs,[122] but Title VII goes beyond the Executive Order to offer

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United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Emphasis added. This rule leaves the door open for the development of new privileges, such as a self-critical analysis privilege, although the fact that such a privilege was not included in the proposed rules weighs against its recognition. *See, e.g.,* United States v. Gillock, 445 U.S. 360, 366-68 (1980) (refusing to recognize a privilege for legislative acts by state legislator charged under a criminal statute; relying in part on lack of recognition in proposed rules and lack of mention by Congress during debates); United States v. Mackey, 405 F. Supp. 854, 858 (E.D.N.Y. 1975) (specific rules reflective of "reason and experience," were, for the most part, a restatement of the federal law of privilege).

Some of the applications of a self-critical analysis privilege, such as protection of hospital committee reports, may be controlled by state legislation. *See* note 22 *supra.* However, state law is inapplicable to Title VII suits, so a privilege for affirmative action plans can only be developed by the federal courts.

120. *See, e.g.,* Murphy, *supra* note 26, at 496; Note, *The Privilege of Self-Critical Analysis,* 96 HARV. L. REV. 1083, 1097-98 (1983); *see also* notes 135-36 *infra* and accompanying text.

121. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433 (E.D. Pa. 1978).

122. The Executive Order combats discrimination by using the federal government's bargaining power to require employers who wish to contract with the government to develop affirmative action plans. *See* notes 1-8 *supra* and accompanying text. Lucrative government contracts may be thought of as an incentive to develop affirmative action plans. Title VII, on the other hand, adopts a more coercive approach to eradicating discrimination. It prohibits employment discrimination and backs up its prohibition with an enforcement mechanism. *See* note 14 *supra* and accompanying text.

strong protection to the individual injured by discrimination.[123] The rights of individuals cannot be vindicated by an affirmative action program alone, and private Title VII suits have proved to be a necessary technique for protecting those rights.[124] An absolute privilege would be one-sided not only in terms of the enforcement of Title VII, but also in terms of the "clash between highly-valued interests"[125] of the employer and employee. An absolute privilege hampers the employee's ability to establish a case of employment discrimination. As noted by one court, "[c]arried to its logical extreme, such a privilege would foreclose any discovery of material which might be most strongly probative of discriminatory intent."[126]

Even if it were legitimate to emphasize the Executive Order at the expense of Title VII and the employers' interests at the expense of the employees', the argument for an absolute privilege overlooks existing alternative means of obtaining access to affirmative action plans. Employers often attempt to justify an absolute privilege by claiming a need to be certain that their plans will remain confidential. However, people who file requests may obtain plans through the Freedom of Information Act (FOIA) and plaintiffs have access to them if they are contained in EEOC files.[127] It may even be shortsighted for employers to advocate eliminating discovery of the plans since plaintiffs might then rely more heavily on these alternative approaches, which lack the safeguards that can be afforded to employers in discovery.[128]

The proposed privilege is also fundamentally different from the privileges traditionally recognized as "absolute," which function to protect and enhance a relationship.[129] A privilege for self-critical

123. *E.g.*, Connecticut v. Teal, 457 U.S. 440, 453-54 (1982) ("Section 703(a)(2) prohibits practices that would deprive or tend to deprive *'any individual* of employment opportunities.' The principle focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole.") (emphasis by the Court); Los Angeles v. Manhart, 435 U.S. 702 (1978) (striking down a retirement program where premiums were set using sex-based life expectancy tables, citing Title VII's protection of the individual).

124. In 1977, the EEOC had a backlog of 130,000 cases and a reputation as the "government's worst bureaucratic mess." The backlog was cut in half and efficiency increased by 65% in the following two years. E. NORTON, A CONVERSATION WITH COMMISSIONER ELEANOR HOLMES NORTON 1-2 (1980). In spite of such improvements, the EEOC does not have the resources to pursue legal action in many cases where conciliation is unsuccessful. *See* EEOC, GENERAL COUNSEL MANUAL, *reprinted in* E.E.O.C. COMPL. MAN. (CCH) ¶ 10,024 (June 1980).

125. O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980).

126. Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433-34 (E.D. Pa. 1978).

127. *See* note 10 *supra*.

128. *See* note 157 *infra* and accompanying text.

129. Wigmore's definition of the four elements necessary to establish a privilege emphasizes the need for a personal relationship between the parties:

(1) The communications must originate in a *confidence* that they will not be disclosed.
(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*

analysis would not enhance the same types of personal interactions protected by attorney-client, doctor-patient or husband-wife privileges.[130] Qualified privileges also further the policy of keeping certain information private, but for reasons that must be measured against and may have to yield to other policies in an individual case. The force of the policies behind encouraging enforcement of Title VII through private suits suggests that a privilege for affirmative action plans, if approved at all, should provide qualified rather than absolute protection for affirmative action plans.

B. *A Balancing Approach to Discovery of Affirmative Action Plans*

Many courts have attempted to balance the interests of Title VII plaintiffs and defendants in determining whether to permit discovery of affirmative action plans.[131] This procedure, essentially that of qualified privilege, has several disadvantages. Most courts undertaking balancing have inspected the affirmative action plans *in camera,*[132] which can be a very time-consuming process[133] and is a questionable use of precious judicial resources. In addition, in nonjury cases, the court's inspection *in camera* may later be an impediment to fair and impartial factfinding by that same judge.[134]

Even more importantly, a policy which leaves the application of the privilege to be determined on a case-by-case basis works against the very policy advanced as a basis for the privilege. Contractors will be as cautious in their self-critical analysis when they cannot be sure of its confidentiality in the face of an uncertain privilege as they are when

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(4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2285, at 527 (J. McNaughton rev. ed. 1961) (footnote omitted, emphasis in original).

130. *See* Flanagan, *supra* note 20, at 574.

131. *E.g.*, EEOC v. Burlington Northern, Inc., No. 78C-269, slip. op. at 3-4 (N.D. Ill. Dec. 10, 1982) (available on LEXIS, Labor library, Courts file); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 217-18 (D. Mass. 1980); Brown v. Ford Motor Co., 19 Empl. Prac. Dec. (CCH) ¶ 8969 (N.D. Ga. 1978); Dickerson v. United States Steel Corp., 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5071 (E.D. Pa. 1976). The balancing approach has also been endorsed by student commentators. *See* Note, *supra* note 10, at 1013; Note, *In re* Burlington Northern, Inc.: *Self-Critical Subjective Analysis Privilege under Title VII Discovery*, 16 CREIGHTON L. REV. 1090, 1111 (1983).

132. *E.g.*, O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980); Brown v. Ford Motor Co., 19 Empl. Prac. Dec. (CCH) ¶ 8969, at 6028 (N.D. Ga. 1978); Dickerson v. United States Steel Corp., 12 Empl. Prac. Dec. (CCH) ¶ 11,095, at 5071 (E.D. Pa. 1976); *cf.* Ligon v. Frito-Lay, Inc., 19 Fair Empl. Prac. Cas. (BNA) 722 (N.D. Tex. 1978) (*in camera* inspection to eliminate material subject to attorney-client privilege).

133. *See, e.g.*, Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980), *vacated and remanded sub nom.* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981).

134. *See* O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980) (not separating responsibility for *in camera* inspection and trial because "contentiousness" of case indicates that separation would result in the devotion of "substantial additional judicial time"). The remedial power granted courts in § 706(g) of Title VII is "equitable" and jury trials need not be provided in Title VII suits. Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).

no privilege is available at all.[135] A qualified self-critical analysis privilege requiring case-by-case application has been described as having potential "as a tactical device in private litigation . . . but as a planning tool for corporate decision makers, its uncertainty overshadows its utility."[136] Those who advocate the self-critical analysis privilege argue that it will be ineffective if confidentiality remains uncertain. Therefore, a qualified privilege will not protect employer's interests adequately, even though it still places a heavy burden on plaintiffs.

C. *Alternative Means of Protecting Employer's Interests*

If a self-critical analysis privilege is not recognized for affirmative action plans, there are other mechanisms that can protect the interests of society and the employer. OFCCP enforcement mechanisms and other incentives such as public pressure for effective affirmative action can support Executive Order goals. The employer's privacy interests can be protected through the broad control of courts over the relevancy and burdensomeness of discovery.[137] Rule 26(c) of the Federal Rules of Civil Procedure facilitates this control by authorizing courts to enter a protective order limiting discovery for "good cause."[138]

Many of the cases that have granted discovery of affirmative action

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135. B. SCHLEI & P. GROSSMAN, *supra* note 10, at 932, counsel that

> [b]ecause of the danger that affirmative action plans and supporting documentation may be disclosed to third parties either through FOIA requests to the OFCCP or through discovery in litigation, contractors should view their affirmative action plans as documents which have potential liability. The plans should be very carefully reviewed to see if they contain statements or admissions which can be used against the contractor in employment discrimination litigation or OFCCP proceedings.

136. Murphy, *supra* note 26 at 495; *see also* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

137. *See* notes 85-91 *supra* and accompanying text. However, it should be noted that the very fact that a plan is deemed irrelevant to a case (*e.g.*, it deals only with minorities while the charge involves sex discrimination) can be evidence of an inadequate attention to certain discriminatory practices. *See, e.g.*, Greenspan v. Automobile Club, 495 F. Supp. 1021, 1039 (E.D. Mich. 1980).

138. Federal Rule of Civil Procedure 26(c) provides:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

plans have done so under a protective order for the whole[139] or part[140] of the plan. Although Rule 26(c) expressly deals only with protective orders affecting depositions[141] and trade secrets,[142] protective orders covering affirmative action plans are implicitly authorized by the rule, which allows a court to order that discovery must proceed on "specified terms and conditions."[143]

Any person "from whom discovery is sought" may file a motion for a protective order.[144] Orders are flexible and can be fashioned to fit the needs of a specific case.[145] The movant has the burden of showing "good cause" for a protective order, and Rule 26 requires a balancing of one party's need for information with the other party's need for confidentiality.[146]

One of the limitations most frequently imposed by protective orders is a restriction on the number and categories of persons who may have access to the discovered information.[147] For example, access may be limited to counsel and to counsel's staff, and then only to the extent necessary to assist in preparing the case.[148] Such a restriction prevents damaging publicity and should deal adequately with an employer's concerns that the release of a plan might hurt employee morale or provide competitors with trade secrets.[149] Restrictions may also be placed on the uses to which the discovering party may put the information. One common prohibition is that the receiving party may not use the information for commercial purposes.[150] When release of

139. *E.g.*, Witten v. A.H. Smith & Co., 100 F.R.D. 446, 454 (D. Md. 1984); Riggs v. United Parcel Serv., 24 Fair Empl. Prac. Cas. (BNA) 93 (E.D. Mo. 1980); Ford v. University of Notre Dame, 24 Empl. Prac. Dec. (CCH) ¶ 31,203, at 17,351-52 (N.D. Ind. 1980); Lignon v. Frito-Lay, Inc., 19 Fair Empl. Prac. Cas. (BNA) 722, 723 (N.D. Tex. 1978); EEOC v. ISC Fin. Corp., 14 Empl. Prac. Dec. (CCH) ¶ 7729 (W.D. Mo. 1977); Wehr v. Burroughs Corp., 20 Fair Empl. Prac. Cas. (BNA) 526, 527 (E.D. Pa. 1977)

140. *See, e.g.*, Jacobs v. Sea-Land Serv., 23 Empl. Prac. Dec. (CCH) ¶ 30,907 (N.D. Cal. 1980) (salary information protected).

141. FED. R. CIV. P. 26(c)(6).

142. FED. R. CIV. P. 26(c)(7).

143. *See* Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1645 n.2 (1980).

144. FED. R. CIV. P. 26(c).

145. *See generally* C. WRIGHT & A. MILLER, *supra* note 15, § 2043, at 305 (1970).

146. *See* R. HAYDOCK & D. HERR, DISCOVERY PRACTICE § 1.9.1, at 54 (1982). The party requesting the order must specifically itemize reasons why the material must be kept confidential. Conclusionary statements are not sufficient. *See, e.g.*, United States v. Garrett, 571 F.2d 1323 (5th Cir. 1978); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

147. *See* J. UNDERWOOD, A GUIDE TO FEDERAL DISCOVERY RULES 132 (1979).

148. *See, e.g.*, EEOC v. St. Francis Community Hosp., 70 F.R.D. 592 (D.S.C. 1976); *see also* United States v. Lever Bros. Co., 193 F. Supp. 254, 258 (S.D.N.Y. 1961) (similar procedure in an antitrust case); Mountain States Tel. & Tel. Co. v. Department of Pub. Serv. Regulation, 634 P.2d 181 (Mont. 1981) (business trade secrets).

149. *See* note 60 *supra* and accompanying text.

150. *See, e.g.*, Chemical & Indus. Corp. v. Druffel, 301 F.2d 126, 130 (6th Cir. 1962). The

commercial information or trade secrets is a concern,[151] the employer can invoke Rule 26(c)(7) and a large body of case law outside the Title VII context.[152] When employers are concerned that the self-criticism in a plan may stimulate further law suits, protective orders can prohibit use of discovered materials by litigants in subsequent legal actions[153] or require that the documents be returned immediately after their use in the trial of a particular case.[154]

Violation of a protective order is grounds for contempt. One commentator has summarized the effectiveness of Rule 26 by stating that "the protection afforded by court protective ord[e]rs is not to be underestimated."[155] However, it may be difficult for a court to determine if ostensibly protected information is disclosed in violation of an order.[156] Despite the difficulties in policing an order, the protective order device represents a logical compromise between the interests of employers and employees in the discovery of affirmative action plans. A court's control over discovery and over the specific protective order provides safeguards not available to an employer faced with a successful FOIA request for the plan. In addition, OFCCP regulations provide little procedural protection to contractors who may object to the

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plaintiff in a Title VII suit is usually an employee and not a competitor with an interest in trade secrets. Nevertheless, problems may arise when plaintiff's counsel also represents another client who *is* a competitor.

151. *E.g.*, Burroughs Corp. v. Brown, 501 F. Supp. 375 (E.D. Va. 1980), *vacated and remanded sub nom.* General Motors Corp. v. Marshall, 654 F.2d 294 (4th Cir. 1981); National Org. for Women v. Sperry Rand Corp., 88 F.R.D. 272 (D. Conn. 1980).

152. FED. R. CIV. P. 26(c)(7). *See generally* R. MILGRIM, MILGRIM ON TRADE SECRETS § 7.06 (Business Organizations Vol. 12A 1984); C. WRIGHT & A. MILLER, *supra* note 15, § 2043.

153. *E.g.*, Sperry Rand Corp. v. Rothlein, 288 F.2d 245, 248 (2d Cir. 1961); Milsen Co. v. Southland Corp., 1972 Trade Cas. (CCH) ¶ 73,865 (N.D. Ill. 1972); Leshem v. Continental Am. Life Ins. Co., 219 F. Supp. 504 (S.D.N.Y. 1963).

154. *See* P. DAVIS, DISCOVERY TECHNIQUES: A HANDBOOK FOR MICHIGAN LAWYERS app. B-99 to -100 (1977).

155. R. MILGRIM, *supra* note 152, § 7.06[1], at 7-78.

156. *See, e.g.*, Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 205 (S.D.N.Y. 1977). In addition to the practical difficulties of enforcing protective orders, an aggressive order may face constitutional challenge. An order restraining extra-judicial comment by parties and lawyers may be attacked as a violation of a first amendment interest in disseminating discovered information. *See In re* Halkin, 598 F.2d 176, 182-83 (D.C. Cir. 1979).

However, it appears that first amendment concerns about protective orders have been laid to rest by the Supreme Court's recent decision in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). The Court held that a court could, under a state version of Rule 26, prohibit a newspaper from publishing information obtained through discovery. Because discovery is a matter of legislative grace, a litigant has only a slight first amendment interest in publicly releasing information obtained for the purpose of trying a case. In contrast, the power to issue protective orders "furthers a substantial governmental interest unrelated to the suppression of expresion." 104 S. Ct. at 2208. Therefore, a protective order does not offend the first amendment if it is entered on a showing of good cause in the context of civil discovery and it does not restrict dissemination of information gained from other sources. 104 S. Ct. at 2209-10. For a critique of the *Rhinehart* decision, see Note, *Access to Pretrial Documents Under the First Amendment,* 84 COLUM. L. REV. 1813, 1837-44 (1984).

release of documents they have submitted.[157] A plaintiff may feel hampered by the restrictions imposed by the protective order, however, alternative means of obtaining access to an affirmative action plan may be even less attractive. FOIA disclosure requests are often time consuming.[158] A plaintiff would probably prefer to obtain the plan through discovery, even if it means adhering to the conditions of a protective order. Thus, both the employer's interest in confidentiality and the employee's and public's interest in facilitating Title VII actions are accommodated by a doctrine that encourages the litigants to submit to court-controlled discovery.

CONCLUSION

Even with their limitations, protective orders can allay many of the fairness arguments against allowing discovery of affirmative action plans. A policy of allowing discovery under a protective order coupled with energetic enforcement of the Executive Order would provide the best balance between the competing public interests in Title VII enforcement and affirmative action as well as the competing interests of employer and Title VII plaintiff. The encouragement of private suits, as advanced in liberal discovery policies and access to affirmative action plans, is particularly important given the current cutbacks in governmental support for EEOC enforcement of Title VII and for implementation of the Executive Order.

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157. It is OFCCP policy to disclose affirmative action plans (whether approved or not), final conciliation agreements and validation studies of tests used to select employees. 41 C.F.R. § 60-40.2(b)(1), (3), (4) (1984). Certain records may be withheld if OFCCP determines release would not be in the public interest and would impede the discharge of its functions. 41 C.F.R. § 60-40.3(a)(1), (2), (5), (6). There is no express provision requiring notification of a contractor that the documents it submitted have been requested through FOIA, but contractors may obtain an agency determination on whether the information they have submitted is subject to FOIA disclosure. 41 C.F.R. § 60-60.4(d).

158. *See* note 10 *supra*.